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Error to. Circuit Court, Pittsylvania County.

Action by Loyd Abee's administrator against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Leigh & Leigh, of Danville, for plaintiff in error.

B. H. Custer, of Danville, for defendant in error.

PAYNE *v.* BUENA VISTA EXTRACT CO.

Jan. 16, 1919.

[98 S. E. 34.]

1. Quieting Title (§ 23*)—Cloud on Title—Possession and Legal Seisin.—Prior to Pollard's Code 1904, § 2726, one could not maintain bill quia timet to remove cloud on title, unless having the legal title and the actual possession; and under such section he could not do so unless having the legal seisin, undisturbed by the possession of another, unless for some special reason the remedy by ejectment was inadequate.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 519.]

2. Estoppel (§ 8 (2)*)—Position in Judicial Proceeding—Quieting Title.—Maintenance of suit quia timet to remove cloud on title could not be justified on the theory that plaintiff's legal seisin was undisturbed, notwithstanding defendant's actual possession, because of defendant's claim to be a vendee of plaintiff's grantor, and the rule that the entry and possession of a vendee is tolled against his vendor and those in privity of estate with the vendor; plaintiff having throughout the litigation denied existence of any contract of sale to defendant.

3. Quieting Title (§ 23*)—Cloud on Title—Possession—White Act.—Bill quia timet to remove cloud on title can, under the White Act, amending Pollard's Code 1904, § 3058, be maintained, though plaintiff be not in possession, if otherwise it could be maintained.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 519.]

4. Quieting Title (§ 19*)—Cloud on Title—Exercise of Jurisdiction—Discretion.—Exercise of jurisdiction to remove cloud on title by bill quia timet is discretionary, where plaintiff has legal title and actual possession, only when there is doubt whether there is such a cloud that injury may reasonably be apprehended therefrom.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 512-513.]

5. Constitutional Law (§ 70 (3)*)—Judicial Functions—Policy of Law.—The Legislature having power to authorize bill quia timet to remove cloud on title, though defendant be in possession, the argument of policy against a law so doing cannot avail with the court.

6. Judgment (§ 570 (12)*)—"Discontinuance"—Effect.—Under

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Pollard's Code 1904, § 3312, providing that a pending case, wherein for more than five years there has been no order or proceeding except to continue it, may be ordered struck from the docket, and it shall thereby be "discontinued," such order is not a bar to a subsequent suit for the same cause; a "discontinuance" being in effect a nonsuit, which simply puts an end to the present action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discontinuance. For other cases, see 17 Va.-W. Va. Enc. Dig. 328.]

7. Judgment (§ 562*)—Res Judicata—Judgment on Merits—A final order, to be a bar to a subsequent suit on the same cause of action, must be on the merits.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 705.]

8. Judgment (§ 570 (16)*)—Bar—Dismissal—Retraxit.—An order of dismissal is not a retraxit, which is a bar to another action for the same cause.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 687.]

9. Judgment (§ 562*)—Conclusiveness of Judgment—Statute.—The judgment in ejectment, which Pollard's Code 1904, § 2756, provides shall be conclusive as to the title or right of possession established in the action, is one on the merits.

[Ed. Note.—For other cases, see 15 Va.-W. Va. Enc. Dig. 322.]

10. Vendor and Purchaser (§ 221*)—Bona Fide Purchaser—Possession under Unrecorded Contract—Statute.—Amendment of Code 1887, § 2465, by Acts 1895-96, c. 758 (Pollard's Code 1904, § 2465), by addition of proviso that possession of any estate without notice shall not be notice to a subsequent purchaser for value, affected possession under unrecorded contract existing at the time of the amendment, as regards subsequent purchasers, so that such possession was not constructive notice, as it was before the amendment.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 599.]

11. Constitutional Law (§ 109*)—Vested Rights—Changing Rule of Evidence—Possession as Constructive Notice.—Amendment of Code 1887, § 2465, by Acts 1895-96, c. 758 (Pollard's Code 1904, § 2465), that as to subsequent purchasers possession of land under unrecorded contract was not constructive notice, did not divest one then in such possession of any vested right of property; it merely changing a pre-existing rule of evidence.

Appeal from Circuit Court of City of Lynchburg.

Bill quia timet by the Buena Vista Extract Company against T. C. Payne. Decree for plaintiff, and defendant appeals. Affirmed.

Volney E. Howard, of Lynchburg, for appellant.

Wm. A. Anderson, of Lexington, for appellee.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.